United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-7016
75-7041

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To be argued by
Gerald Orseck.

P 15

United States Court of Appeals

For the Second Circuit.

ROBERT ELLIOTT and SHIRLEY ELLIOTT,
Plaintiffs-Appellees,

against

MAGGIOLO CORPORATION, MAGGIOLO CONTRACTING CO., INC., MAGGIOLO FOUNDATION CORP., G & A CONTRACTING CORP. and RONNIE GORR,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLEES ELLIOTT.

GERALD ORSECK,
Counsel to
EDELMAN, BERGER, PETERS & KOSHEL,
Attorneys for Plaintiffs-Appellees Elliott,
Route 52 East,
Liberty, N. Y. 12754

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

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I. Statement of the Case.

This personal injury negligence action, in the United States District Court by virtue of diversity of citizenship, was tried in the Eastern District of New York before Chief Judge Jacob Mishler and a jury. After 12 full days of trial and 2,583 pages of testimony[1] the jury found for the plaintiffs, and awarded Robert Elliott the sum of $350,000 for personal injuries and $28,000 to Shirley Elliott, his wife, for her derivative cause of action.

Defendants subsequently moved on papers (FRCP 50b, 59) for a new trial (26a-34a). The motion was denied in a "so-ordered" memorandum opinion by Judge Mishler (35a-37a). On December 20, 1974, after oral argument, and just one week after the trial, Judge Mishler noted

[1]Sixteen witnesses testified. Eighty-nine exhibits were offered during the trial. Five depositions were read into the record.

that "it's only a week ago that the verdict came in and I remember this case almost as if it were being heard now."[2]

II. Issues on Appeal; Contentions of Parties.

Defendants-appellants contend, in four points on appeal, that they did not receive a fair trial.

Point I attempts to characterize various medical history in evidence as "planted"; that is, supplied through efforts of counsel; and then to bottom a claim of reversible error in denial of mistrial or new trial on alleged attorney misconduct in summation and at trial with regard to the history and other isolated matters.

The appellants do not, as they cannot, challenge the admissibility of the history, which was a) introduced without objection in various particulars; b) properly received; c) and elicited and fully developed on cross examination and d) to a mathematical certainty was not "planted"; which was for the jury to determine in any event.

Rather, the appellants choose to argumentatively label the history as "planted"—a matter which the jury, on evaluating the doctors, their credibility, and the medical records—quite properly decided against them.

They do this to lay the subtle, prejudicial predicate for their legally bankrupt argument that improprieties in summation and during trial, with reference to the history, deprived them of a fair trial.

The point has not a hint of merit because:

a) The appellants were offered a mistrial during plaintiff's summation. They flatly *refused* it, on a considered decision; and thus, as the trial court held, "waived" the matter.

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[2]Transcript of argument on December 20, 1974, page 13 (365a).

b) The trial court, in a peculiar position sensitively to assess the matter, flatly found that its reprimand of counsel before the jury "removed any possible advantage to plaintiffs or prejudice to defendants" (35a).

c) Curative instructions—unduly restrictive to plaintiff—were given, to the benefit of the *defendants,* and to the undue detriment to the plaintiff.

d) The matters complained of, on this lengthy record, were not sufficiently serious to award a mistrial anyhow; and indeed, the conduct and summation of plaintiffs' trial counsel were well within the broad perimeters allowed in final argument.

e) Conduct of appellants' counsel was characterized by the trial court as equally improper.

f) No abuse of the trial court's broad discretion in denying the new trial motion can be shown; especially since the ruling on motion for mistrial was "invited."

Point II urges error in the exclusion of certain purported impeachment testimony.

The appellees will show that the exclusion of the evidence assigned by appellants as error was, in fact, a proper ruling; that even if the exclusion were erroneous, which it wasn't, there could be no reversible error, because, as the trial court squarely held, the substance of the excluded evidence had already been received in evidence; and that defendant was offered an alternative means of getting the excluded matter into the record, which defendants refused.

Point III argues that isolated instances of appearance of plaintiff's children in court was prejudicial.

The children's limited presence in the courtroom meant nothing in that they were alluded to, without objection, early in the trial; *appellants'* counsel mentioned their presence in his own summation; and they were removed from court when the trial court—on its own—advised that they should be. And, appellants' counsel never raised the issue during or after trial, and tries now to make something of it for the first time on this appeal.

Point IV simply asks for a new trial, claiming that substantial justice requires it.

But the trial court properly denied a new trial on a record showing overwhelming proof and support for the jury verdict in the absence of *any* meaningful error. Plaintiffs contend that the t .l was a fair one: that justice was done upon an exhaustive, thorough and complete trial.

III. Counterstatement of Facts.

The appellants do not—as they cannot—challenge the sufficiency of the evidence. Rather they imply weaknesses in the proofs, thereby seeking to breathe life into legally insignificant arguments. They disregard the cardinal rule requiring that the evidence be viewed in the light most favorable to the plaintiffs who secured the verdict. So viewed, the record shows an overwhelming case of liability and negligence, reducing the points raised on appeal to legal nothingness.

Appellants' references to the "facts" a) are vague, argumentative, incomplete and more significant for what they omit than what they include; b) fail to apprise the reviewing court of the overwhelming weight of plaintiff's evidence in support of their claim; and c) are replete with self-serving characterizations.

Contrary to the *unfair* statements and characterizations of the evidence interspersed throughout appellants' brief (i. e., p. 4; "hard proof lacking" on liability; substitution by plaintiff's counsel of "technique," "guile," "foul" means for proof), which characterizations we resent and deny, the record-support for liability is strong, clear and borders on the conclusive.

The record-evidence emasculates the not-so-subtle, unfair and incredible recitation of the "defenses" at trial; i. e., that defendant's trucks were not present on "Glen Wild Road" at time and place of accident, and thus "the accident" did not occur as alleged and the claim was "fabricated."

This mere prejudicial recitation is inappropriate, meaningless and shorn of all credibility by the factual record disclosures; including defendants' *own* business records, documentary evidence, and independent eyewitness testimony.

In the proper light the facts are as follows:

a) *The Plaintiff's Lucid, Direct Clear Testimony.*

On April 24, 1972 (R305*), Robert Elliott, was an employee of the Village of Woodridge (R302). Defendant Maggiolo Contracting Corp. was doing demolition work in the vicinity (R307-308) and used, together with other equipment, 10-wheel dump trucks all painted red (R309). On that morning, loads of debris from demolished buildings were being hauled away by the trucks (R309).

While cleaning out a storm sewer catch basin on the Glen Wild Road around 11:00 a.m. that morning (R313), Elliott was struck in the face with a board which "came flying off" (R318) one of Maggiolo's red Ford 10-wheel tandem dump trucks (R319). There was no way for the trucks to get to the dump without traversing the Glen Wild Road where Elliott was hurt (R311).

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*Page references to the stenographic minutes are referred to in this brief as R305, etc. All such references, although not cross indexed, are printed in Volume II of the Appendix

b.) *The Injuries—Uncontradicted.*

Elliott sustained serious personal injuries, the nature and extent of which are not questioned by the defendants here. Elliott was examined by two physicians for the defendants—Dr. Jack Lisman, an ophthalmologist and eye specialist, and Dr. Morton Marks, a neurologist (R2199-2204, 2208), neither of whom testified at the trial (cf., p. 4, brief of appellants, which refers to a defense of "exaggeration" at the outset, in a subtle effort to color the appeal and to add credence to the points raised—which do not and cannot include a claim of excessiveness or anything like it).

The injuries included: broken orbit in left eye (R958); chorioretinal scar (R975); injury to left eyeball, cracking the floor of the orbit and displacing the eyeball (R958, 976), requiring operative repair (R894); 100% functional loss of the left eye (R979); fractured maxilla (R1068); loss of sensation in the area of the left cheek (R882); multiple scars of the left cheek and left side of the nose (R882); 100% hearing loss of left ear (R704, 710); disability related to head and brain injury with post concussion syndrome (R891); damage to the left infra-orbital nerve (R888).

c) *Independent Eyewitness; Schact.*

Joe Schact, an independent eyewitness (R596), testified that he owned a bungalow colony in Woodridge, New York (R598). On April 24, 1974, between 11 and 12 o'clock (R598, R601) he had given a shovel to Elliott (R603) to clean out a storm sewer catch basin (R604). Schact had Elliott in sight when a red dump truck (the Maggiolo colors) loaded with debris passed between Schact and Elliott (R605). Schact heard a scream and saw Elliott lying down (R605-06). There was a plank on the ground beside Elliott (R606), but no branches (R624).

d) *Deposition Testimony of Defendants' Driver, Dave Utegg.*

By deposition taken July 5, 1974, at the courthouse, Dave Utegg testified that he drove a Maggiolo Ford ten-wheel truck painted red on the date of the accident (R84); that he had been hauling debris to a dump (R85) located up the Glen Wild Road (R88). He saw Elliott's truck on that road before lunch (R89) and saw a man whom he later learned to be Elliott near the sewer catch basin as he carried debris up to the dump (R90-91). Elliott had a rake in his hand (R108).

Dave Utegg testified that on the date of the accident what all of Maggiolo's truck drivers mostly did was to carry debris to the dump (R92); that the other trucks passed each other on the Glen Wild Road on the way to and back from the dump frequenly that morning (R124).

e) *The "Non-Witness" for the Defendants; the Notebook Entry Corroborating Consistent Version of Plaintiff From the Outset.*

Defendants then called Irving Newmark, Superintendent of Public Works for the Village of Woodridge. He testified that on April 24, 1974, there was an urban renewal demolition project in the village (R1123); that, on April 24, Elliott "was out cleaning mud and sand that had washed off the demolition lots on to the street" (R1130). Newmark got word that date that Elliott had been in an accident near Schact's Bungalow Colony (R1156-7). Newmark had been told that a board was involved in the accident (R1158).

He said that the demolition contractors had as much debris loaded on the trucks as possible and that the loads were above sideboards of the trucks (R1256-7).

On cross examination *by plaintiffs' counsel,* Newmark, who had attempted in every incredulous manner to defeat plaintiffs' claim,[3] *for the first time* produced his personal notebook. He first said he never mentioned the contents to defense counsel or any of their three investigators (R1433-5); but acknowledged he had shown it—and delivered it—to one of the trial counsel for defendant (R1435, 1430-33). The notebook, in Newmark's *own* handwriting, made on the day of the accident, stated: "*Bob said a board fell off one of Maggiolo's dump trucks and hit him while he was cleaning catch basins.*" (Italics supplied.)

Newmark had testified earlier that the workmen's compensation report C-2 which he filed three days after the accident reflected nothing other than his own *opinion* as to how the accident happened. Newmark admitted that his conclusion was not even "a result of what somebody" told him (R1449).

Newmark had a personal animosity toward Elliott (R1438-1441, R1452-53), but he was socially friendly with one of Maggiolo's employees (R1454).

f) *Defense Witness Diaco—Support for Plaintiff's Claim.*

In spite of the fact that defendant's witness Newmark had testified under direct examination that on the day of the accident only sand and loose fill were being carted

[3]Newmark stated: i) only sand was being loaded on the day of the accident (R1136); ii) that there was only one demolition project in the works on that date and that was at Highland Avenue (R1123) (R1447-8); iii) that he saw a pine tree branch about one inch around the size of a dime, with blood on it; v) that he checked tree tops 30 or 40 feet high to see where the branch came from (R1416); vi) Newmark filed a Workmen's Compensation C-2 form stating that Elliott was somehow hurt by a branch stuck in his truck while Elliott was trying to get the branch loose (R1216).

(R1136), *defendants'* witness Diaco testified that debris was in fact being carted on that day, but he said this was done only in the afternoon;[4] that the debris was taken to the dump, and to get to the dump, the trucks had to go down the Glen Wild Road past the scene of the accident (R1475-8011, 1489-91).

Significantly, Diaco told that the defendant Maggiolo employed a laborer with a pickup truck to follow the trucks on to Glen Wild Road "in case a board * * * or something like that did fall off a truck. He would be behind to pick it up and throw it into his pickup truck" (R1483, 1642).

g) *Defendant Maggiolo's Business Records—Support for Plaintiffs' Claim; Further Dissipation of Already Incredulous Defense That Trucks Were Not Present.*

During Diaco's cross examination, Maggiolo's truck trip cards were received in evidence (Plaintiffs' Exhibit 32 in evidence) (R1537). The trip cards indicated that on the date of the accident the four dump trucks carted 34 loads of debris and 20 loads of sand (R1546). Two of the trucks each hauled nine loads of junk and five of sand; the other two trucks each hauled eight loads of junk and five loads of sand (R1542-45). The trucks carting and dumping debris "had to go along the Glen Wild Road past Fred's Bungalow Colony (where the accident happened) to the dump in order to dump it" (R1542).

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[4]First, the defense position was that no debris was carried down Glen Wild that *day;* then, the defense witnesses conceded they carried debris that day, down Glen Wild Road—but strangely stated this transpired only in the afternoon. Then, the story was changed. Indeed, debris was carried in the morning, but was dumped at another site—the laundry (R2041-2). The incredulous defense came full circle when it was determined that the laundry was not demolished until a later date and was in full operation at the time of the accident (R2041-2).

It took 40 minutes for a truck to be loaded with debris, to haul the debris away, and return to the demolition site (R1593). Nine trips for any one truck would take six hours; each truck worked two hours on the date of the accident carting sand (R1590-6).

This written admission against interest, a document kept in the ordinary course of business, conclusively belied the defendants contention that no debris was loaded or hauled that day until after 2:00 (R1489). The work day ended at 4:30 p.m. (R1588) and it was physically impossible for the trucks to each load and dump nine loads of debris in the 2 1/2 hours between 2:00 and 4:30 p.m.[5] All of this was supported by a statement, revealed upon cross examination, that Diaco himself had given to the defendants' investigator in June, 1974 (R1614). Diaco's written statement (R1614) belied Newmark's testimony that during the lunch hours all four trucks were parked together near the Inter-County Co-Op (R1641); in fact, at the lunch break, some of the trucks were at the dump.

h) *More Proof of Overload* (Plaintiffs' Exhibit 41).

Diaco told the jury that a photograph (Plaintiffs' Exhibit 41 in evidence) (R1639) showed the manner in which the trucks were loaded on April 24th.

i) *The Nails in the Coffin on the "Defense"—The Self-Contradiction of Defense Witnesses; Contradiction of Clear Business Records and Independent Eyewitnesses; Changes in Their Versions; the Defense Witness "Convention."*

Diaco testified that on a Sunday in July, 1974, prior to the trial, Mr. Sergi (defense trial counsel), an in-

[5]Later, it developed that the trucking operation was shut down at about 3:30 p.m. (defendants' witness Dubois, at R1858). This made the defense even more ridiculous.

vestigator, a stenographer, Harold Utegg, Milo Conklin, Brian DuBois, Wilbur DeGroat, Al O'Banner and Diaco himself met at the Patio Motel, in Monticello, that each of these men received $50; that they discussed the case and that a steno-reporter made a record of the meeting (R1651-1659).

Defendants' Alan MacDowell, Maggiolo's "front end loader operator," stated that the only time during the day of the accident that he loaded debris on the Maggiolo trucks was from 3:15 to 4:30 (R1724), although one of the drivers swore that work stopped at 3:30 on that day (R1858). MacDowell stated that each of the four trucks made but one round trip each to haul away debris (R1724). *This was in the face of Maggiolo's own trip tickets* (Plaintiffs' Exhibit 32 in evidence) (R1537). The jury obviously found, as will be apparent to this appellate court, that MacDowell's testimony was inaccurate, and that he was "programmed" to state that the debris-hauling began after 3 p.m. He interjected that statement many times, without even having been asked (R1737, 1740 twice, R1743 twice, R1759 twice). (And see the court's charge on "pat" testimony [68a].)

Brian DuBois testified for the defendants. He was one of the four truck drivers. All of them quit work at 3:30 p.m. on the date of the accident (R1858).

In the opening statement, defendants' counsel stated, with respect to the truck drivers, that "he will prove that they have stated and that they will state * * * that they were *never* on the road on that date."

On direct examination DuBois acknowledged that he *had* made a trip down Glen Wild Road in the afternoon (R1823-1824).

Yet, the defense was still predicated on the premise that *no Maggiolo trucks were on the Glen Wild Road on the*

date of the accident (R1906-7). Sure enough Brian DuBois testified on direct examination that he had told plaintiff's counsel he *was not* on that road at all that day (R1914, 1923). DuBois did testify that on occasions wood would fall off his truck (R1916) and that Maggiolo had an employee picking up wood that fell off the trucks (R1918).

DuBois, who always had denied that he ever had been on the Glen Wild Road on the date of the accident, changed his version at trial [after the trip tickets were in] and indicated that on one occasion in the afternoon he had taken debris down the Glen Wild Road on that date (R1961, R1823-24). He also testified that the other drivers to his knowledge only took *one* such load each down the Glen Wild Road to dump on the date of the the accident (R1961-63).

DuBois testified that he expected the defendants to pay him $650 for his testimony (R2015). He was confronted with a number of prior statements in writing in which he stated that he was positive that neither he nor any of the other drivers had *ever* been on the Glen Wild Road or carried debris *at any* time on the date of the accident (R2027, 2033-2035). He was very friendly with Harold Utegg (R2252-54).

Harold Utegg, another of the four drivers, swore that he was never on the Glen Wild Road at *any* time on the date of the accident (R2082). *He then later admitted he was on the road at least once that day,* and *so was* his brother David, who carted a load of debris; but he said this was only in the afternoon when demolition work was done (R2082-2083). Later, he said that his brother Dave, another driver, *said* that he was never on the Glen Wild Road on that morning; and that he had said the same thing, on inquiry during investigation by plaintiff's counsel (R2093). This testimony becomes very significant later.

Harold Utegg told of the defendants witnesses' convention or "hearing" at the Patio Motel in Monticello when he was given a subpoena, and was paid a witness fee (R2110-2112).

k) *Rebuttal Independent Witness; Director of Urban Renewal of Town; Trucks Were Loaded in Morning.*

In rebuttal, the plaintiff called the then Director of Urban Renewal, Charles Bernstein. He testified that buildings were being knocked down on the *morning* of the accident (R2144). This testimony was obviously credited by the jury.

He saw trucks loaded with building debris *before* lunch and *before* noon on the date of the accident (R2145). The Urban Renewal Director stated that Plaintiffs' Exhibit 39 in evidence showed how the trucks were loaded with debris before noon on the date of the accident (R2147).

The case for liability overwhelms; a second-grade child would have found for the plaintiff; and the damages and injuries are beyond question. The matter was *exhaustively* tried. The jury has spoken.

The defense, like "shifting sand" (R2394), ranged from a claim that the accident—smashing the plaintiff's face, bones and head—was caused by a small branch, the side of a dime in diameter. That defense was decimated. Next it was urged the board was not from defendants' truck because no defendants' trucks were on Glen Wild Road that day. Then, when there could be no question that they were, defendants urged that no truck was there at the time of the accident, and the claim is a recent fabrication. Defendants then say, maybe there was debris loaded that morning, but it was dumped somewhere else —at the laundry. But the laundry was not demolished until much later (R2041, 2042).

Defendants' own records; eyewitness and independent testimony; documentary evidence; the Newmark notebook; medical proofs—all emasculate these flimsy and obviously contrived defenses.

IV. ARGUMENT.

I.

No abuse of discretion or reversible error in denial of motion for mistrial or new trial for attorney misconduct—Point I without merit.

Appellants apparently argue in a vague, obtuse way that the introduction of medical history, coupled with alleged improper argument thereon, somehow entitles them to a new trial. Appellants would urge that the plaintiffs' original attorney, retained *two months* after the accident (R549, 582), created the theory of liability by "planting" it in medical histories.[6] This has nothing to do with the claim of error, and was for the jury to consider anyhow.

And the facts are to the contrary to these contentions. It is never mentioned in any history that a branch of a tree caused the injuries as was—at the outset—the appellants' first of many unsupported and preposterous contentions. Let us see, instead, what the *record* shows.

A.) *Characterization of History, as "Planted" Has No Basis in Record.*

i) The History to Dr. Bessen; 1½ Hours After the Accident.

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[6]We resent the implication, dignify the claim in the denial, and point to the record anyhow, which establishes to a *mathematical certainty* the "inaccuracy"—for want of a better word—of the contention.

At the emergency room of the Community General Hospital about 1½ hours or so after the accident, the history given to treating physician, Dr. Seymour Bessen, indicated that Elliott was struck in the face by a board (R1066). Appellants went out of their way in cross examination to verify this (R1077).

The history given to Dr. Seymour Bessen, the treating physician (R1063-1066; Chief of Surgery at two hospitals, including the one in question), on April 24, 1972, *at the Community General Hospital*, just 1½ hours after the accident, was "necessary * * * both as to diagnosis" and "treatment" (R1066). That history was given directly to Dr. Besesn by Mr. Elliott and *his wife* in the emergency room. It properly was allowed, and we quote *verbatim* therefrom:

> "The history was that he was working at the side of the road. There was some urban renewal work going on in Woodridge and there was a truck with debris that passed, *a board fell from the truck and hit him and he was struck by this board on the side of his face*— (R1066-67).[7]

The doctor continued (R1068) and described the *severe injuries*. He was then asked, without any objection:

> "Q. Did you place down the time of the happening of the occurrence on your hospital record?" (R1068.)

The answer speaks for itself:

> "*Yes, it happened at 11:30 a.m.*" (R1068). (Italics supplied.)

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[7]When defense counsel *interrupted* and asked if Dr. Bessen was *reading* from the hospital record, the doctor answered "no"; and stated he was reciting the history as he was asked to (R1067). The answer was forthcoming prior to the trial court's statement that the doctor was *not* to answer the interruption question! (R1067.)

The history, given on the *day* of the accident, within 1½ hours, was included in the hospital record and was included in a report by Dr. Bessen, on September 11, 1972, to plaintiff's counsel, who had not been retained until *months* after the accident (R1066-1067, 548, 582).

Mrs. Elliott, a nurse at the hospital, and Mr. Elliott both participated in reciting the history to Dr. Bessen in each other's presence; both "contributed" (R1073-1074); and Mr. Elliott was responsive (R1074). Dr. Bessen could not recall just what *Mr.* Elliott "contributed" and what *Mrs.* Elliott--the nurse—"contributed" (R1073-1074).

On this basis, in their brief, the appellants, *implying that part of the April 24 history was planted by an attorney, as opposed to having been furnished by the Elliotts, misled the court in the following manner:*

> "Dr. Bessen admitted that he had known Mr. Orseck for a number of years (S.M. 1072). Notwithstanding the fact that the history in the hospital record was limited to 'struck in the face with a board' the doctor was permited to give a history which showed up in a report *some five months after the accident* (Italics defendants). *On cross examination, the doctor admitted that he could not recall part of the history was given by Mr. Elliott and, yet, he was permitted to testify to a history which supported the plaintiff's version to a 'tee'; history clearly given to him by counsel, and not the patient as part of treatment*" (brief, p. 8). (Italics ours.)

A kindergarten student can see that Dr. Bessen testified clearly that he could not recall what part of the complete history was given by Mr. Elliott, as contrasted with Mrs. Elliott—his wife, nurse—in the emergency room at 1:30 p.m. on April 24, 1972; but the defense, in its brief, mentions only that Mr. Elliott gave some

history, and suggests that the import of Dr. Bessen's testimony was that Mrs. Elliott's contribution was given by an attorney. *She* is not mentioned in the passage in the brief.

The only thing "planted" here are seeds of an improper attempt to upset a fully justified and proper jury determination.

Of course, the history given to Dr. Bessen, showed up in a report to counsel five months later—but so what? As a matter of fact, something else showed up later too—for the first time at trial, over 2 1/2 years after the accident, on cross examination of the defense witness *Newmark*.

On cross examination, the Newmark notebook, *known to defense trial counsel and in his possession* (R1430-31, 1435), was *by chance question obtained* by plaintiffs' counsel. The handwritten notebook—known to defense counsel—and written by Newmark in his own writing on the day of the accident (R1433), contains, *inter alia*, this remark with reference to the plaintiff:

> *"Bob said a board fell off one of Maggiolo's trucks and hit him while cleaning a catch basin"* (R1434). (Italics supplied.)

If this was "planted," someone other than the plaintiffs' attorney, who didn't come on the scene for *months* after, had the green thumb.[8] So then, as said before, we *resent* the whole flavor of the defense, their brief, and

[8]We will refrain from characterizing the behavior of defense counsel, who sat idly by with notice and knowledge of the notebook; let Newmark testify as he did; remained silent; and *now* claims a fabrication of plaintiff's claim through planted history of plaintiff's lawyers.

their improper appellate approach.[9] Dr. Bessen most assuredly—as the jury obviously believed—was totally credible, believable, and honorable. Nothing was planted with him; the defense seeks to "plant" seeds of doubt, in an unjustifiable manner.

ii) HISTORY GIVEN TO DR. COSENTINO; DATE OF ACCIDENT; NO OBJECTION, AND OBVIOUSLY NO "PLANTING."

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[9]On page 7 of the brief, the defense counsel italicizes Dr. Bessen's answer, in response to a question defense counsel improperly injected during direct, as something surreptitious. Dr. Bessen was asked if he were reading from the hospital record. He answered that he was not, but that "I am telling him as he asked me to" (R. 1066). The brief, page 7, makes it appear that counsel asked him to recite a history in a certain manner—departing from the hospital record. This, most respectfully is "bush-league."

Because the question to which Dr. Bessen was responding *as trial counsel* asked him is omitted from the brief. The precise question was:

> "Q. And who gave that history? A. *The history was given to me by Mr. Elliott and his wife.*
>
> "Q. And did you place *that* history down on the hospital record itself? A. Yes, sir, it's here on the record.
>
> "Q. Could you please tell us what that history was?" (R. 1066-67).

This was what Dr. Bessen responded to when he said he was not reading from the record, but was "telling him (counsel) as he asked me to" (R. 1067); he was telling *what* the Elliotts—not counsel—told him (R. 1067). He did not expand the hospital record history, and defense counsel objected to the reading of the exact words from the record—which would *corroborate* the testimony (R. 1068-69; R. 582).

The April 24, 1972 report to the Compensation Board is not inconsistent; it says: "was struck in face with board at work." A board is not a *branch*. Nor was Dr. Bessen, at R. 1066, testifying from a "planted" history (Brief pg. 6). He was testifying as to what the *Elliotts* told him, which he included in the record (R. 1066-67). And he was called as a treating doctor who saw Elliott right after the accident; not merely to furnish history. Indeed, he described carefully the extensive injuries, which render ludicrous the "branch" theory (R. 1066-72).

Dr. Cosentino's written history, taken from Elliott *on the date of the accident,* was received in evidence (R196, 197, 267, Plaintiff's Exhibit 4 in evidence) without objection:

> "Accident. Hit in face by a plank which fell off a passing truck while working" (R197).

Appellant did not object to Dr. Cosentino's reading of this history from his notes even prior to the receipt of the document in evidence (R197).[10]

iii) History Given to Dr. Peimer on June 12, 1972.

Nor did appellants object to Dr. Peimer's history taken from Elliott, other than on a preliminary inquiry as to his status as a "treating" as opposed to "examining" physician, which question was left to the jury. The history was:

> "That he was injured on April 24 of 1972, at about 11:30 in the morning; that he was cleaning a storm drain, that a passing truck veered and lost some debris, from the top of it and he was hit on the left side of his face by * * * yes, one by six inch plank * * *" (R672, 673).

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[10]The defense asserts an inconsistency. Dr. Cosentino's partner, in a comp report, said that Elliott said that a "board hit me in the face while working on the truck" (Maggiolo Ex. A). How does this show the attorney not in the picture until months afterward, planted anything? Hurrah; the defense found a slight word discrepancy—in reports, writings and histories given on the day of the accident. This gives them no right to make the *improper* allegations that they do. Nothing was planted, and a 3-year-old could perceive it. The defense was fortunate in being able to refer to "comp" anyhow; but the comp report has no bearing on the *illogical* "planting" argument.

Even the court remarked that the Consentino history tended to negate any "recent fabrication" (R. 660). The court also referred favorably to counsel's reputation—R. 661—being questioned unjustifiably here.

Now, to be sure, plaintiff then was represented and accompanied by counsel, but nobody "planted" anything as the doctor pointed out (R730).

The appellants were quite satisfied with the court's instruction to the jury on "treating" versus "examining" physician (R668, 670). Appellants themselves developed the history in cross examination of Dr. Peimer (R732).

iv) History to Dr. Gaynin from Elliott: August 14, 1972.

Similarly, the appellants further developed the history (R946-947, 949: "He told me that on 4/24/72, while on a highway he was struck by a plank which fell from a truck")—by cross examining Dr. Gaynin (R1007-1013). Although the appellants claim reversible error *(infra)* because of plaintiffs' reference to the history portion of the Vassar Hospital records, in summation, the appellants themselves developed on cross examination that Dr. Gaynin's history, to some extent, came from the medical history in the Vassar Hospital records (R1008-1024). Thus, the so-called objectionable history was already in the record, put there by the appellants themselves (R1012, Defendants' Exhibit O in evidence).

We now examine the quotation in appellants' brief (p. 9) from R1009 (actually 1010), and particularly the last question and answer. There, reference is made to a later report to plaintiff's counsel, dated October 13, 1972 (R1009), which bore a history that plaintiff was struck by a plank "that was stored on a truck that passed on the highway"—not at all inconsistent with the falling plank (R1010).

Defense counsel asked where Dr. Gaynin got the information about the "board that fell." The quote on page 9 *leaves out* the last part of the question and the negative response. The last part of the question and the

first part of the answer omitted from the quote in the brief, are as follows:

> "Did one of the attorneys suggest it to you?
>
> "Mr. Edelman: I object.
> "The Court: Overruled. I will allow it.
>
> "A. *NO.*" (Italics supplied.)

This is omitted, without reason or explanation, in the brief without any indication of the omission, and the balance of the matter and answer is included.

So also omitted is the flat denial by the witness (R1021) that he received from counsel the history that the plank fell from the truck (R1021) as opposed to information from Vassar hospital records (R1022). Moreover the "falling board" was exactly what Elliott told Dr. Bessen and Dr. Cosentino, *months* before counsel ever got into the case, as we have seen. And the Newmark *notebook* closes the book on this *contention* anyhow; and the word game wherever any slight inconsistency appears is mind-boggling.[11]

One thing is for sure, there was no "branch" involved; as the crushing injuries show.

The defense seems to question (brief, p. 9) the right of plaintiff to obtain reports; to exchange information with, and to consult their physicians; they disregard the duty of *opposing* trial counsel to prepare plaintiff's case.

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[11]Counsel stated in a letter to the doctor that the plank extended out beyond the truck (R. 1019). This was not accurate, but it certainly belies any "plant" by counsel of an indication that the plank "fell."

The doctor's own handwriting reflects a change from plaintiff hit by plank "on highway," to plank which "fell from truck" (R. 1011-1012). The information was obtained from Vassar Hospital records—and an error was made as to day of accident.

There is no showing of any inhibitions as to the defendants' preparation of its case. Fortunately Dr. Bessen, Dr. Consentino, and defense witness Newmark, all made their written records and entries prior to retainer of counsel. And so did Vassar Brothers Hospital (R327-28).

All of the facts surrounding the histories; all time sequences and relationships fully were explored. The defense was free to advance its illogical argument, which it did—and quite understandably, it was rejected by the jury. They do not challenge admissibility, which they can't; and advance the "planted" history appellation simply to color their claim of attorney misconduct in summation beyond all proportion.[12]

The predicate for claim of reversible error with regard to so-called prejudicial summation is nonexistent.

B. *No Abuse of Discretion in Denial of Mistrial or New Trial; Point Not Preserved; Any Improprieties Cured Anyhow by Curative Instructions; And no Prejudicial Misconduct Shown no Matter How Viewed.*

In perspective, the claims of trial counsel misconduct in arguments relating to the histories—unfairly characterized as "planted"—are frivolous, as are other claims of attorney misconduct. The appellants, on a monumental record, stress legal minutiae, and attempt to make mountains out of molehills. On top of all else, the claim of

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[12]The defendants seize at straws in the wind; an incident involving a slamming of a paper by a trial attorney coupled with a look at the jury (R. 1037), and an inquiry which came "close" to violating a prior evidentiary ruling (R. 1060), do not require a new trial on a massive multi-thousand page record on an extended trial. The matters on page 10 can't be serious.

Indeed, with regard to conduct in *this* case, the trial court equated the conduct of defense counsel with that of plaintiff's counsel.

error with regard to summation has not even been preserved; was cured in any event; and the summation was well within permissible broad latitude.

1. Point Waived; When Offered a Mistrial During Summation, Defense Counsel Specifically Declined It.

During plaintiffs' summation, concerning the histories, and on defense counsel's objection, the trial court twice asked if defendants desired a mistrial; and the offer was rejected. Defendants' counsel said specifically: *"I don't want a mistrial"* (166a), and effectively waived claim to a mistrial.

Appellants' refusal of the offer of a mistrial was not unadvised. It was conscious, knowledgeable, and calculated. In view of the time and money spent by them on the case, they did not want a mistrial (166a-167a); they would "rely on Your Honor to correct it in the charge, if you can" (167a).

As Judge Mishler held:

> "* * * You cannot decide to waive error knowingly, willfully, waive an error in the trial and say, 'Well, there was an error and I want to appeal on that error'" (transcript of oral argument, December 20, 1974, p. 12, 365a).

> "Why should I give * * * a mistrial if you think you can? * * * What you're saying is 'I don't want a mistrial. I want to see what the verdict is'" (transcript, *supra*, at 15, 367a).

> "* * * At the end of the case, mind you, at the point where he could look back and have a good look at it, I said, 'Mr. Sergi, if you want a mistrial you can have it.' He said, 'I don't want it'" (transcript, *supra*, at 16, 367a).

The clincher follows:

> "The Court: Then why didn't you take advantage of it (the mistrial) at the point where it would do you the most good, at the end of the case?
> "Mr. Fetell: That became a legal judgment" (*supra* at 367a, 368a).

Appellants cannot change their legal judgment because they lost.

In the formal order denying the post-trial motions (35a), Judge Mischler crystallized the matter as follows, with regard to claims of attorney misconduct:

> "In any case, Maggiolo cannot now ask for relief on this basis since he was offered a mistrial and declined it. He has, thus, waived his right to raise this argument again in a motion for new trial" (35a).

On this basis above, Point I fails. The rule is clearly stated in 5 C. J. S. *Appeal and Error*, §1501, "Error Committed or Invited by Party Complaining":

> "One may not complain on review of errors below for which he was responsible or which he invited or induced the trial court to commit."

A mass of cases and applications of the "invited error" doctrine are collected and discussed (§1501, pp. 857-861; and see §§ 1502-1508).

In *Baldwin v. Nall*, 323 Mich. 25, 34 N. W. 2d 539 (1948), a party rejected the opportunity afforded to him for a mistrial, and, after an adverse verdict, sought a new trial as do the appellants in this case.

In ruling against the appellant, the Supreme Court of Michigan said:

> "A party cannot sit back and after the jury decides against him claim error after he had been given the fullest opportunity to correct any alleged error at the trial" (34 N. W. 2d at 542).

Similarly, in *Raymond v. Southern Pacific Co.*, 259 Ore. 629, 488 P. 2d 460 (1971), the Oregon Supreme Court denied a new trial and pointed out that the appellant

> "was willing to gamble, first, that he would win the case, and second, that if he didn't win, the trial court would grant his motion for a mistrial."

And, in language directly applicable here, the court reasoned that the appellant, like the appellants here:

> "may gamble if he desires, but, if he loses, he cannot use as a basis for an appeal the trial court's (post-trial) refusal to grant his motion. The public's interest in the efficient use of the judicial process does not permit it."

"Invited error" is similarly treated in the federal courts:

> "appellant will not ordinarily be permitted to complain of an error which he himself invited or which at his instance the court committed" (*Ornstein v. U. S.*, 1 Cir. 1951, 191 F. 2d 184, 193).

A party may not be heard to complain when the Court "did what it was asked to do": *Glassman Constr. Co. v. U. S.*, 4 Cir. 1970, 421 F. 2d 212, 215; or when appellant itself "induced" the error—if any there is—at trial. *Director General of India Supply Mission v. Steamship Maru*, 2 Cir. 1972, 459 F. 2d 1370, cert. den. 409 U. S. 1115, 93 S. Ct. 898.

Complaints as to comments during summation cannot be made in the first instance upon appeal.

Crumpton v. United States, 138 U. S. 361, 364;
Dougal v. Williams, 405 F. 2d 867 (3rd Cir.);
Dimon v. N. Y. C. & H. R. R. Co., 173 N. Y. 356;
Cattano v. Metropolitan Ry. Co., 173 N. Y. 565;
Kinne v. International Ry. Co., 100 App. Div. 5, 8-9;
Rice v. Ninacs, 34 A. D. 2d 388, 390-391;
Schein v. Chest Service Co., 38 A. D. 2d 929 (cited with approval, 24 Syr. L. R. 482);
Laton v. Somat, 39 A. D. 2d 640;
Raymond v. Southern Pacific Co., supra;
Subella v. Southern Pacific Co. (Cal.), 449 P. 2d 750, cert. denied 395 U. S. 960;
Baldwin v. Noll, supra.

2. Even If Summation Were Improper With Respect to Medical History There Was a Full Curative Instruction—No Abuse of Discretion Shown in Denial of New Trial.

When the trial court asked defense counsel if a mistrial were desired because of plaintiff's summation concerning history, defense counsel replied that he did not want a mistrial and stated that:

> "I rely on Your Honor to correct it in your charge, if you can. I trust that you will * * *" (166a-167a).

Thereupon, the trial court thoroughly instructed the jury that the histories were available for comment by trial counsel to rebut any suggestion that they were planted by one of plaintiff's counsel; and thoroughly instructed that it was improper for trial counsel to attempt to use the histories to show how the accident occurred. The trial court instructed that the jury had a right to know what Mrs. Hyatt in fact told the doctors, as required for diagnosis, but that these matters were not substantive evidence (166a-167a). And, the trial court thoroughly admonished counsel (168a) in the presence of the jury.

Nonetheless, the histories were properly in evidence and before the jury; and they emasculated any claim of a recent fabrication or planting.[13]

A mass of cases hold that curative jury instructions, such as these, cure the prejudicial effect—if any—of the improprieties; and that the trial court's discretion in denying a mistrial because of the ameliatory effect of curative instructions will not lightly be reversed on appeal. The improprieties, if any there were, were shorn of any meaning; their effect was neutralized; and no mistrial—which was rejected when offered anyhow—or new trial was required.

The curative instructions then, which were perfectly satisfactory to defense counsel, end the matter; see, for example, *Murphy v. Lehigh Val. R. Co.*, 2 Cir. 1947, 158 F. 2d 481; *Smith v. Town of Orangetown*, 2 Cir. 1945, 150 F. 2d 782, cert. denied, 326 U. S. 767, 66 S. Ct. 171; *Carr v. Standard Oil Co.*, 2 Cir. 1950, 181 F. 2d 15, cert. denied, 340 U. S. 821, 71 Sup. Ct. 52; *Lanni v. Wyer*, 2 Cir. 1955, 219 F. 2d 701; *Har-Pen Truck Lines, Inc., v. Mills*, 5 Cir. 1967, 378 F. 2d 705, 715; *Pasotex Pipeline Co. v. Murray*, 5 Cir. 1948, 168 F. 2d 661; *Spach v. Monarch Ins. Co. of Ohio*, 5 Cir. 1962, 309 F. 2d 949, 953.

Here, in a formal order denying the motion, the trial court characterizing trial counsel's conduct as something less than to be desired, squarely held, within its broad discretion on matters of this kind, as follows:

> "However, the court did everything within its power to counteract any prejudice caused by this

[13]We will later discuss the propriety of counsel's argument; we sincerely believe that there was no impropriety in the argument. However, we assuredly respect the trial court's views on the matter, and if any impropriety there were, it was totally dissipated, and shorn of all consequences, by the trial court's vigorous curative instructions.

behavior. *The court is convinced that its strong reprimand before the jury of plaintiff's trial counsel removed any possible advantage to plaintiffs or prejudice to defendants. In any case, Maggiolo cannot now ask for relief on this basis since he was offered a mistrial and declined it. He has, thus, waived his right to raise this argument again in a motion for new trial"* (35a).

Again, here the matter rests.[14]

Let us now examine, in the light of the nature of the defense and the appellate approach, the other claims of impropriety reflected in the appellants' brief (pp. 11-14).

1) The trial counsel specifically was answering defendants' contention that the case was fabricated, and did not happen the way plaintiff—and a mass of independent documentary and eyewitness testimony showed that it did. The history given to Dr. Bessen right after the accident was quoted verbatim.[15]

This most assuredly was in evidence. No objection had been made. Counsel showed, in corroboration of Dr. Bessen's testimony, Mr. Elliott's own statement that he told the Community General Hospital in Liberty exactly what had occurred. While the Community General Hospital history itself was not in evidence, the testimony of Mr. Elliott that he indeed gave them the history, exactly as he testified to at trial, *was in evidence* (R327-328), together with Dr. Bessen's (R1066-1067). Mr. Elliott told the hospital precisely the same version of the accident as the version to which he testified and this fact was in evi-

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[14]This is particularly so since appellant's counsel acquiesced in the way the curative instructions were given to the jury; *Smith v. Town of Orange Town, supra*, 2 Cir. 1945, 150 F. 2d 782, 786.

[15]"While at work, a passing truck loaded with debris had a board fall off striking the patient on the left side of his face" (R. 2430).

dence without objection (R327). Nor was there any objection to this first excerpt from the final argument, mentioned in the brief (p. 11; see first half of p. 2431 of trial record).

2) Next, in answering the contention of a fabrication, Mr. Edelman, *not* violating any trial court ruling with regard to inadmissibility of the history in the hospital records themselves, simply argued that when Mr. Elliott was taken to the hospital in Poughkeepsie, right after the accident, before any lawyers ever were involved in the case, *Mr. Elliott*, "at that time * * * stated, they asked him the history, and he gave them the history exactly as he said it" (R2431).

The objection was that history was not included in the hospital record exhibit, which had been excluded by the trial court (R2431). But Mr. Edelman was not referring to excluded hospital records themselves. He was referring specifically to the *testimony* of Mr. Elliott, which was in the trial record; that when he was removed to the hospital in Poughkeepsie, on the day of the accident, the history was taken from him, and the hospital personnel asked him how the accident happened. Mr. Elliott's record testimony was that he told them that the accident happened just as he already had testified (R327-328). To further emasculate the contention of a recent fabrication, Mr. Edelman recited testimony which already was in evidence; he did *not* refer to an excluded history in a hospital record; rather he referred to the precise testimony of Mr. Elliott.

The final argument on page 2431 of the record did not depart from any ruling. To this date we do not know what was wrong with it, but respect the trial court's admonition. In all events, the objection, further pressed, was that the comments on history were improper because

they were "not in evidence"[16] (R2432). But, as shown, the statements made by Mr. Edelman *were* based on evidence in the record. In all events, the trial court carefully instructed that it had excluded any history "in any hospital report." He advised the jury not to consider it; and advised further that trial counsel's repetition of the history did not add to the credibility of plaintiff's substantive testimony on the stand (R2432-33).

3) Then, when advised to proceed, Mr. Edelman argued *from the testimony of Dr. Gaynin.* He advised the court that he was adhering strictly to the record of testimony (R2433) and then recited what Dr. Gaynin specifically had stated with regard to the history, and the change, with reference to where the plank came from: the change from "highway" to "fell from truck" (R1011-1012). He then urged that indeed Dr. Gaynin, on cross examination, when asked by defense counsel where he got his information that the plank fell from the truck, testified that he obtained it from the Vassar Brothers Hospital record. This is exactly what the record shows. And this argument, is perfectly proper to emasculate the contention that Dr. Gaynin's history was obtained from counsel, which Dr. Gaynin flatly denied. It was defense counsel who thus elicited the nature of the history contained in the record itself, at Vassar Brothers Hospital. The defendants cannot complain about "planted" history; talk about recent "fabrication"; and then cry when the records, made right on the day of the accident, totally dissipate any such contention. This simply is unfair, and surely no grounds for reversal.

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[16]And as we have seen, during cross examination of Dr. Gaynin, the defense counsel brought out itself that indeed part of Dr. Gaynin's history, containing a statement that a board fell off the truck, was obtained from the Vasser Hospital records themselves. This was not the fault of the plaintiffs; it was something which was developed on cross examination by *defense counsel* (R. 1008-1024).

Mr. Edelman did not address himself to anything not in evidence; he did not, as the context shows, think that he was doing anything wrong at all. He was simply dissipating the improper and totally unfounded defense. It was at this juncture that the mistrial was invited and refused by defense counsel.

4) One final reference to hospital records was made. In summation, counsel remarked that according to the Community General Hospital record, the accident was fixed at 11:30 a. m. (R2435). Again, objection, and Mr. Edelman stated that the time of the accident was not part of the actual history of the happening. The court thoroughly admonished counsel in the presence of the jury, and that was it. Of course, there had been direct testimony from the eminently qualified and reputable Dr. Seymour Bessen (R1068), to the following effect:

> "Q. Did you place down the time of the happening of the occurrence in your hospital record? A. Yes, it happened at 11:30 a. m.
> "Q. Did you place the mechanism of the accident on the hospital record? A. Yes" (R1068).

Thereafter, when Dr. Bessen had been asked about what the hospital records themselves stated as to the mechanism of the accident, objection was sustained. But indeed, there was evidence, without objection, on this record, that Dr. Bessen had noted in the hospital records that the accident occurred at 11:30 a. m. Now on appeal, these defendants, who subtly sought to transfer the happening of the accident to the lunch hour when they say their trucks weren't on the road, again complain. They want, on this appeal, to make the same recent fabrication accusations which they made before the jury; but they don't want to face the realities. Mr. Edelman did not mention a single isolated matter which was not in the record. He simply destroyed the contention that these defendants still continue to make; that liability on their part was a matter of fabrication; that the histories were planted.

The trial court seemed to adhere to the general rule against hospital records history, ordinarily not available as substantive evidence to show how the accident occurred. But here, in the face of defendants' contentions of "recent fabrications," the histories emasculate such contentions. Thus, the plaintiff suffered by the trial court's restrictive ruling. The matters argued *were* in evidence, and the jury was advised not to consider history for purposes other than as required for medical treatment. It was the plaintiff who suffered from the rulings—the defendants have no complaint.

Plaintiff's statements made in hospital records immediately after the accident are admissible to rebut any claim of a later fabrication. *Lichtrule v. City Savings Bank*, 29 A. D. 2d 565 (1967). See also *Crawford v. Nilan*, 289 N. Y. 444 (1943), and see *Abrams v. Gerrold*, 37 A. D. 2d 391 (1971).

Under Federal Rules of Civil Procedure, 43 (a), the evidence was admissible for that purpose, and, if admissible for that purpose, it was permissible to argue it for that purpose.[17]

In any event, the plaintiff was *not* permitted to use the history for this purpose; strong, clear curative instructions were given; the defendant denied the offer of a mistrial when it was offered to it; and no prejudice possibly could have resulted.

3) *Claims of Other Improprieties Without Merit.*

Pages 14 to the second paragraph on 16 of the brief of the appellants simply are self-serving characterizations of plaintiffs' trial counsel. We disagree with what is therein stated, and we resent the lifting of language from appellants' own trial motions, into the brief, coupled with

[17]See also, *Applebaum v. American Export Isbrandtsen Lines*, 2 Cir. 1972, 472 F. 2d 56.

an effort to establish their characterizations as a beginning and end of what occurred at this trial.

1) A simple dispute on an evidentiary matter, in the utmost of good faith (126a), with regard to what records had been shown to plaintiffs' counsel, and an apology by plaintiffs' counsel, is the whole substance of what is complained about at 126a-127a. Plaintiffs' counsel believed that there were daily progress reports which had not been made available to him (128a) and asked for them (see 128a-130a). The trial court cleared the air with a careful instruction to the jury with regard to the matter (132a-133a). An isolated instance like this in a 12-day trial is preposterous and should be considered just for what it is.

2) During cross examination of the defense witness, Dubois, it was revealed that an investigator for the defense attorneys had taped conversations with the witness (R1927-1929). Mr. Edelman asked for the production of the recording. The court stated that he had asked trial counsel not to demand production in front of the jury. Counsel apologized. The court admonished counsel in front of the jury (R1929). In all events, the trial court then, in the absence of the jury, ordered defense counsel to bring in the tapes with the investigator (R1932). A motion for mistrial was denied and the trial court stated simply, as is obviously the case:

> "I don't think this is of such prejudice that it will make a difference to the jury but I am thinking of doing it just to teach Mr. Edelman a lesson. It cost him money to prepare the case."

3) The trial court was far from concerned with only the conduct of Mr. Edelman:

> "The Court: You see, the jury is starting to snicker at the antics of both lawyers, and if you want to laugh yourself out of court, go right ahead

and do it" (145a; with reference to repetitious evidence, far from improper).

Moreover, isolated comments by the trial court with reference to the way the case was being tried, not even in the presence of the jury (R2209-2211; 146a [grandstand play]; and references to prior experiences with counsel in other cases; 109a) hardly point to a new trial here.

We must also point out that the trial court was thoroughly upset by defense counsel's antics in many respects. Thus, the trial court squarely stated that, based on prior experiences with Mr. Edelman, he was the more upset; but, based on the matters in this case alone, the court might say everything it said to Mr. Edelman to Mr. Sergi also (R2282).

> "The Court: Don't for one minute think that I believe that Mr. Sergi is going to be the man with the white hat and that Mr. Edelman is going to be the villain here. I am going to watch them both" (R2283).

The trial judge was at all times in control of the courtroom. There were, perhaps, minor instances of misconduct, common to both sides. But under such conditions, the defendants themselves cannot chastise the plaintiff's counsel and thereby secure a new trial, see, e. g., *Compagnie Nationale Air France v. Port of New York Authority*, 2 Cir. 1970, 427 F. 2d 951.

II.

No reversible error with regard to David Utegg depositions—Point II without merit.

A.) *David Utegg's Deposition Testimony on Merits.*

David Utegg testified by deposition that on April 24, 1972, he was driving on the Glen Wild Road; that he saw

Mr. Elliott's truck on that road prior to lunchtime (R89). He saw a man—whom he later learned to be Elliott—near the sewer catch basin on the right side of Glen Wild Road as he carried debris up to the dump that day. He described Elliott (R90-91). David Utegg, indeed, was hauling debris. He described the location of the Elliott truck (R92). He testified to the function of a pick-up truck, who was to follow the Maggiolo trucks in the event debris fell off (R93). He further described the plaintiff—standing at the side of the road holding a rake (R94). Utegg specifically repeated that prior to lunch he was carrying debris, and the other trucks that morning passed each other back and forth, to and from the dump (R123-124). As do the appellants, we also ask that the Dave Utegg deposition testimony be read in its entirety (R83-133). The witness stated squarely that indeed he had advised plaintiffs' counsel of this version when he was interviewed at counsel's office (R129).

B.) *Self-serving Background Matter of Appellants Inappropriate.*

We do not agree with the characterization of the single excerpt (brief, p. 22) of appellants where they state that Mr. Edelman simply led the witness into proper answers. This witness stated that he had always adhered to this version. We do not appreciate the suggestion that this witness was coerced into giving these answers for *quid pro quo* (brief, p. 23). The argument was made, and the jury found otherwise. We don't appreciate this appellate approach in the light of the defense witness conclave at the Patio Motel, where the defendants' drivers agreed that they were never even on the Glen Wild Road on the day of the accident. This was the opening defense—despite defendants' own business records to the contrary. Nor do we appreciate this in the light of the defense-driver witnesses contradiction of their own business records.

Finally, we reject the self-serving non-record statement on page 23 of the brief that defense "investigation"

reveals that Mr. David Utegg had told his brother that he had not told the truth at the first deposition. Where in this record is there ary indication that any investigation indicated any such thing? No such proof was ever proffered or suggested on this record. We do not appreciate the statement by defense counsel that they were firmly convinced that the only way they could have exposed this "fraud" was to bring David Utegg into the courtroom (brief, p. 23).

These defendants again depart from the evidentary record, and state that they "were forewarned," through investigative sources, "that when the trial day arrived, David Utegg would be in a hospital and unavailable" (brief, pp. 23-24); that they prepared an affidavit setting forth these facts openly to Judge Mishler; and they contend that they did so as officers of the federal court with many years of practice before that court (brief, p. 24). We also are officers of the federal court with many years experience. We stand on our position the same as the defense counsel does and we do not like much of what the appellants are purporting to do.

Their brief is less than candid. As Judge Mishler pointed out to them on this record, it was impossible for these defendants to know where David Utegg would be on the trial date, because he was in the hospital for surgery before defense counsel or anybody was even notified that the case would begin on the date that it did.

> "The Court: Now, Mr. Sergi, that argument falls of its own weight. Because I am telling you that I didn't know until yesterday that the criminal cases were going to plead out. I didn't tell my girl to call you. Did you get a call before yesterday to tell you to come in on Monday?
>
> "Mr. Sergi: No, Your Honor.
>
> "The Court: Wasn't it yesterday that you called to tell me that Jeffrey was pleading out?
>
> "The Clerk: Yes, sir.

"The Court: We were supposed to have a criminal trial on Monday. He couldn't have known it. Maybe adding one and one up and getting three * * *" (93a).

"The Court: Had nothing to do with setting it down. He didn't go into the hospital because this case was set down for trial for Monday; that is clear. Oh sure, it was the investigator that suggested that's what he would do and he seemed to be—Mr. Sergi—clairvoyant.

"The Court: That had nothing to do with it. Whatever else there is to your case, that has nothing to do with it" (93a).

The man entered the hospital for surgery. The transcript of the application indeed is reproduced in full in the appendix (86a).

Nor was Judge Mishler's ruling unclear. Language taken out of context is employed (brief, pp. 24-25) to make it appear as thoug' the trial court made a confused ruling. The truth of the matter is that the trial court simply allowed counsel, together, to go to Scranton to redepose the witness in the hospital; to determine whether the witness would change his testimony; and to lay a predicate for impeachment testimony—ostensibly given by the witness to a trained investigator, as the defendants represented (104a). He never dispensed with the need to establish a foundation for the use of the alleged David Utegg statement to an investigator that he wished to change his testimony (106a-107a). The trial court carefully pointed out that a foundation could be laid by confronting the witness with the alleged statements to the "trained investigator," so that upon a trial to use the impeaching prior inconsistent statements. When read in context, there was no confusion at all (107a).

Counsel then went to Pennsylvania and redeposed Mr. Utegg in the hospital. His second deposition was read into evidence at the trial (171a). It is said *in appellants' brief only,* on page 26, that defendant's investigator "learned that David admitted his lies to his brother Har-

old, and Harold was brought into court to testify to David's admission of lying" (brief, p. 26). We have seen no proffer or statement in the record which says any such thing. All that appears on this record was the trial court's clear impression—which the defendants created—that the purported concession of David Utegg that he had told less than the truth on his deposition was made to a trained investigator (107a). There was no confusion and there was no error.

C.) *The Second Deposition.*

The deposition of David Utegg in Pennsylvania is revealing. He reiterated, under oath, at the deposition taken at the hospital, that his prior deposition was true then and was true now. He stated that he did not wish to change anything (172a-173a; 174a). Any semblance of the alleged desire to change testimony simply was not forthcoming and the defendants fell flat on their face (177a-196a).[18]

[18]Utegg, on cross examination, specifically stated that indeed he had told plaintiff's counsel, on an original interview occasion, that he was driving a truck down Glen Wild Road with debris on the truck on the morning of the accident; and that this statement was made in the presence of his brother Harold (182a). The witness denied that he ever told plaintiff's counsel, Mr. Orseck, on the first occasion, that he had not been carrying lumber and debris on his truck on Glen Wild Road that morning (185a). The rest of the interview by plaintiff's counsel were carefully covered. David Utegg, on the second deposition, denied he told his brother in a telephone conversation after his original deposition that it was not true that he had been driving a truck down Glen Wild Road the morning of April 24, 1974 (191a). He also denied that he hold Harold, at the home of another brother after the first deposition, that he had not told the truth and that he would change his testimony (194a). There was no showing of any so-called "recantation" or desire to recant; and no showing of any conceivable foundation of any statement to a trained investigator; nor to this moment is there any proof or proffer or showing that this witness ever told anyone, much less Harold, that he had testified falsely, under oath, on his original deposition—which was read at trial.

D.) *Harold's Trial Testimony—the Absence of Foundation.*

Defense counsel claims on appeal that on the trial he was about to have the brother, Harold Utegg, testify that David admitted to him that he had lied (brief, p. 27). There is no such indication in the record, by offer of proof or otherwise, that Harold would have testified to any such thing. Indeed, the only pertinent question asked of Harold Utegg was this:

> "Q. Did you *ever* have any conversation with your brother David Utegg after he gave that testimony? A. Yes, Sir.
> "Q. What did he tell you about it?
>
> "Mr. Edelman: I respectfully reject.
> "The Court: Objection sustained. I will sustain any questions that relate to any conversation that this witness had with his brother. It's pure hearsay.
> "Mr. Sergi: I don't think we have to excuse the jury, Your Honor. I just want to bring this to your attention if I may (handing document to the Court).[19] I ask whether I can ask those questions now.
>
> "The Court: No. That doesn't change my mind at all. I didn't buy that ruling in any way, he eliminated the need for a foundation. I explained that to you on any number of situations" (209a).[20]

[19]In context, apparently a paper reflecting a prior ruling—but we have no way of knowing what it was. (See *Palmer v. Hoffman*, *infra*, 63 S. Ct. 477 at 482.)

[20]On another occasion, before this one, the question had been asked whether the witness Harold had any conversations with his brother David; and the witness answered that he had called David on the phone the night after the New York deposition and asked him how everything went. The only other question was a simple inquiring "yes"? An objection was sustained. The defendants do not even contend that there was any error with regard to the ruling, which did not even involve a specific question.

In this record, there is no proffer that the witness Harold at any time would have stated that his brother said that he lied on his deposition; nor is there any indication in any offer of proof that Harold would have said what it was that David supposedly prevaricated about. Certainly there is *no* showing that Harold would have testified as to such a statement by David during any specific conversation with which David had been confronted on his second deposition. In its brief, defendants show only a general question, as to whether David "ever discussed his testimony" (209a).

Accordingly, the defendants cannot claim error. Only on post-trial motion arguments did they state that *Harold* would have said that David had lied in his deposition. What was it that David purportedly told Harold that he lied about, and *where* and *when?* There is no basis for the innuendos in the record and there is no offer of proof.[21]

Finally, on top of all else, Harold Utegg and Dubois were carefully examined with regard to what took place in the office of plaintiffs' counsel on the interviews of the witnesses.

Harold Utegg did testify for the defendants that David Utegg indeed told plaintiffs' counsel, in Harold's presence (something denied by David) that David did not drive his

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[21]On the second deposition of David, questions were posed to him as to whether he had a conversation on the phone with Harold on the day of the first deposition and he was asked in the front yard, of either David's or Harold's house and he admitted that there was such a conversation. But he denied that he stated that on those or any other occasions he wanted to change his testimony and recant. If this was a purported foundation for anything *asked of Harold at trial,* concerning prior inconsistent statements, it fell far short, because at no time was any question even posed to Harold about what was said during a conversation on the lawn; and he never was asked a specific question about any such statement by David during the phone conversation (191a; 194a; 209a).

truck down the Glen Wild Road on the morning of April 24, 1972 (R2093). There was no objection to this testimony and it was received in evidence. The direct clash and conflict between two brothers in this regard was on the record.

E.) *The Order Denying New Trial.*

In its order denying the motion for a new trial, the court below carefully pointed out that second deposition was allowed on the statement of defense counsel that David Utegg had made statements "to defendant's investigator" indicating that he gave false testimony at the first deposition. The court stated (35a) that there was no suggestion at any time that it would be unnecessary to establish a proper foundation for the admission of prior statements made to an investigator, or anyone else, under the law established in *U. S. v. Wright*, 489 F. 2d 1181 (D. C. Cir. 1973); *Fortunato v. F. M. C.*, 464 F. 2d 962 (2nd Cir. 1972); *U. S. v. Hayutin*, 398 F. 2d 944 (2nd Cir. 1968); McCormick, Evidence, §37 (1972).[22]

Upon denying the motion for new trial, Judge Mishler wrote:

> "The court also notes that Harold Utegg did testify that David Utegg told plaintiffs' counsel in Harold's presence, that he did not drive his truck down Glen Wild Road on the morning of April 24, 1972 (R2093). Plaintiffs' counsel made no objection to this testimony and it was admitted into evidence. Under such circumstances, it is difficult to see how Maggiolo was substantially prejudiced by the court's refusal to admit David Utegg's prior inconsistent statements.

[22]As Hayutin indicates, statements such as this indeed are prior inconsistent statements, because they are statements purportedly made prior to the reading of the deposition at trial. And of course absent proper foundation, they are pure unadulterated hearsay.

"Accordingly, defendants' motion for new trial is in all respects denied and it is so ordered" (37a).[23]

This ruling was not reversible error for many reasons.

1) Absence Of Proffer Or Offer Of Proof As to What Harold Would Have Said With Regard To Any Specific Conversation Fatal To Position On Appeal.

Rule 43(c) of the Federal Rules of Civil Procedure provides for offers of proof, to the end that a record of excluded proof may be contained in the record on appeal. In this manner, reviewability of rulings excluding evidence is assured and prejudice, or lack of it, can be evaluated. An offer of proof is not mandatory. It is required where the significance of the excluded evidence is not obvious or "where it is not clear what the testimony of the witness would have been or that he was even qualified to give any testimony at all." *Fortunato v. Ford Motor Co.*, 2 Cir. 1972, 464 F. 2d 962, 967.

Here, no specific question was asked of Harold Utegg with regard to any specific conversation that he had had with David after the first deposition. No specific question was posed with regard to either of two such conversations with which David had been confronted on his second deposition. Absent any specific question to Harold, relating to a specific conversation and remark by David at a specific time and place, there could be no showing that Harold was even "qualified" to render an impeaching or conflicting statement—if indeed that was what he intended to do. No question reflects that Harold was even "qualified" to give an answer. Nor, on this record is it demonstrated what the testimony of the witness

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[23]With regard to prior inconsistent statements or statements made to anybody else, an offer of a continuance for a third deposition was made to defense counsel so that a proper foundation for any prior statements could be obtained. This was refused (37a).

would have been. There is no way to determine that Harold would have said his brother prevaricated under oath, in any specific material respect or respects, or, indeed, in any innocuous respects. Appellants' self-serving statements show no such assurance. To the contrary, it was represented to the trial court that prior inconsistent statements had been made to trained investigator. The claims, on post-trial motions, as to what Harold would have said, come too late with too little.

Fortunato v. Ford Motor Co., supra, 464 F. 2d 962, governs here. In that case, various rulings were made by this court, directly applicable here. The language of the court speaks for itself:

> [7-9] The main purposes for this rule are to permit the trial judge to reevaluate his decision in light of the actual evidence to be offered, cf., McCormick, Evidence, §51, at 113-14 (1954), and to permit the reviewing court to determine if the exclusion affected the substantial rights of the party offering it, Fed. R. Civ. Proc. 61. An appellate court will not reverse on the mere possibility that the exclusion was harmful, *Palmer v. Hoffman,* 318 U. S. 109, 116, 63 S. Ct. 477, 87 L. Ed. 645 (1943); *Boulter v. Chesapeake & O. R. Co.,* 442 F. 2d 335, 336 (6 Cir. 1971); *Sorrels v. Alexander,* 79 U. S. App. D. C. 112, 142 F. 2d 769, 770 (1944), nor will it permit a party to allege on appeal what it failed to claim to the trial court. To do so would allow a party to obtain a new trial simply on its claim that it would have proven a certain fact or facts had it been given a chance.
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> • • •
>
> Gloyd, who was employed in the Safety Office of the Chief of Engineers of the United States Army, was asked, "Do you know how many of the Ford line the Army buys a year?" Objection to the question was sustained. Counsel for Ford did not explain to the trial court what the purpose of the question was or what line of inquiry he was seeking to pursue, nor did he ever make an offer of proof.

Fortunato contains a further ruling directly applicable here. At 464 F. 2d 968-969, this court showed the need for a proffer in a situation *such as this one* and held as follows:

> Finally, Ford claims error in the exclusion of testimony designed to impeach Comparato by showing a prior inconsistent statement.
>
> * * *
>
> [15] During Ford's cross examination of Comparato, the latter acknowledged that he had spoken to a man on the telephone who might have been Hughes; however, Comparato claimed that he told the person on the telephone that he would not answer any questions concerning the accident. *Although it is the rule that a prior inconsistent statement cannot be used to discredit a witness unless he has first been asked whether or not he made such a statement, United States v. Hayutin,* 398 F. 2d 944, 953 (2 Cir.), cert. denied 393 U. S. 961, 89 S. Ct. 400, 21 L. Ed. 2d 374 (1968), Comparato was never asked.
>
> [16, 17] *The court cannot accept Ford's self-serving statement in its brief on appeal of what the alleged inconsistent statement was. The purpose of the line of inquiry and an offer of proof must be made at the trial where the witness is available and the trial court is in a position to reconsider its decision* (464 F. 2d 968-9). (Italics supplied.)

Here, as in *Fortunato*, the defense asks us to accept self-serving representations of what alleged inconsistent statements would have been. But, fatally, there was no showing in the general question presented to Harold at trial (brief, p. 27; 209a) that he was qualified to answer it. There was no showing that he was testifying about a specific conversation with which David had been confronted. The question simply concerned "any conversation" with David "ever" about his testimony and what David allegedly told him about his testimony (209a). *Hayutin, supra,* requires a direct specific confrontation

with the witness sought to be impeached; and upon his denial of the specific conversation at this specific time and place, he may be impeached by independent evidence of a prior inconsistent statement *in that conversation.* No such question was posed here and there is no indication at all as to what the answer would have been or that Harold was even "qualified," *Fortunato, supra,* to answer it. Nor was there any indication at all that Harold would have said that David conceded that he lied at all, much less as to any specific item on his deposition.

At the time Harold was being questioned, defense counsel handed a piece of paper to the trial court and the trial court ruled that the paper did not change its mind; and that it in no way had eliminated the need for a foundation as it had explained on "any number" of situations (209a). The document was never even marked for identification, nor were its contents ever proffered.[24] The only other hint of a question to Harold was a non-question (208a). Harold said he had the phone conversation with David and asked how everything went at the deposition. The next question objected to was "Yes?" The objection to this was sustained; properly so. No *hint* of a proffer was made and nothing even suggests what Harold would have said in response to the non-question. Appellants do not even raise the matter in their brief.[25]

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[24]Because of the trial court's remarks the paper appeared simply to reflect a prior ruling.

[25]We resent, but do not controvert the *seriousness* of the defendant's claim. They have remedies available to them if they can establish a fraud on the court. See Federal Rule of Civil Procedure, Rule 60 (b). Then a full testimonial hearing on the matter *might* be had. But the place to try out a claim of fraud is not in the appellate court on a record which fails to substantiate it.

Controlling here is the United States Supreme Court decision in *Palmer v. Hoffman*, 318 U. S. 109, 63 Sup. Ct. 477. The case is on virtual all fours with this one:

> One of respondent's witnesses testified on cross examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See *Edison Electric Light Co. v. United States Electric Lighting Co.*, C.C., 45 F. 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c. We do not reach that question. *Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous.* Mere "technical errors" which do not "affect the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. §391, 28 U.S.C.A. §391. *He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners.*

Here, as in *Palmer*, it is impossible to say that any ruling was prejudicial even if we conjecturally assume error. We cannot determine what Harold's answers would have been; or whether they related to anything with which David was confronted.

On this basis alone, the judgment should be affirmed. It would be manifestly unfair to predicate reversal here upon mere self-serving statements. This record indicates that David and Harold disagreed as to what was told to counsel with regard to David's presence on Glen Wild Road on the morning of the accident—simply a conflict, fully and adequately otherwise developed on the record, which the jury clearly resolved in favor of the plaintiffs.

2.) As Trial Court Held, Even If Harold Would Have Testified That David Said He Was Not Telling The Truth, This Could Not Change Result Here. The Brothers Disagreed On Everything; Harold Already Had Testified That David Said That He Had Not Been On Glen Wild Road On That Morning.

The testimony of Harold and David was in direct conflict. Harold, like the other drivers was compelled to admit that defendants' trucks traversed the Glen Wild Road on April 24, 1972. The trip cards demonstrated this beyond any question. As the trial court pointed out in denying post-trial motions:

> "The court also notes that Harold Utegg did testify that David Utegg told plaintiff's counsel in Harold's presence that he did not drive the truck down Glen Wild Road on the morning of April 24, 1972 (TR at 2093): Plaintiff's counsel made no objection to this testimony and it was admitted in evidence. Under such circumstances, it is difficult to see how Maggiolo was substantially prejudiced by the courts refusal to admit David Utegg's prior inconsistent statements."

The exclusion, thus, was indeed harmless (Rule 61), even if we assume, somehow, that Harold would have said that David admitted that he was not telling the truth on deposition. David already had been shown to be in conflict with the defense witness drivers. Even

if Harold would have testified contrary to David's assertions—that David admitted that he was not telling the truth—this would merely be a further cumulative conflict between them. As the trial court here held, exclusion of evidence which in essence is cumulative, is not reversible error. *Draddy v. Weston Trauling Co.*, 2 Cir. 1965, 344 F. 2d 945; *Smith v. Bear*, 2 Cir. 1956, 237 F. 2d 79. And exclusion of evidence, which obviously would not change the results of the case, is not harmful error, even if the exclusion were erroneous, which it wasn't: *D'Agostino Excavators Inc. v. Heyward-Robinson Co.*, 2 Cir. 1970, 430 F. 2d 1077, cert. denied, 400 U.S. 1021, 91 Sup. Ct. 582.

3.) Trial Court Correctly Ruled On Absence Of Foundation.

Again, we simply point out that the defendants represented *to the court* that statements to defendants' investigator by David indicated that David gave false testimony at the first deposition. The second deposition was scheduled, as the trial court held, on the strength of such representation. Thus, the trial court, much less counsel, had no way of knowing that Harold ostensibly was prepared to testify—if indeed he was, which has not been shown to this date, that David had made these representations to Harold. At least a proffer should have been made. Certainly, the general questions posed to Harold could have resulted in a "potpourri" of information of which could well have been inadmissible. It was incumbent upon the defendants to ask specifics; and to proffer any document or testimony to show that Harold would have said something relevant—see, e.g., *Trade Development Bank v. Continental Insurance Co.*, 2 Cir. 1972, 459 F. 2d 35. And this should have been on trial, not afterwards in the Second Circuit.

The trial court held squarely that no foundation had been laid for the testimony which Harold was about to

give—which the defense seemed to indicate was warranted by the document never marked for identification previously referred to (footnote 24, *supra*). We can only assume that no foundation, under the "Hayutin" doctrine, had been laid on the second deposition for whatever it was the defendants desired to show. Notwithstanding this, the trial court was willing to let the defendant go back and take a further deposition to lay the foundation for the particular conversation. But the defendant turned down the opportunity. According to the trial court: "The offer was refused, and Maggiolo, in effect, waived his right to use that ground for a new trial as well" (37a).

We would point out that further representations of the defendants in their pursuit of this argument are out of context and not fairly stated. While the court stated that:

> "I painted myself into a corner on that" (148a)

it indeed was not talking about the admissibility of statements without a foundation. The remark concerned whether plaintiff's counsel had stipulated as to how the defense could handle the absence of David Utegg at the trial, and whether unfavorable comment on the witnesses' absence from the trial could be made (108a).

III.

No error with regard to isolated limited presence of children in courtroom—children were removed at trial court's own insistence and no motion for mistrial made; nor was matter raised in post-trial motions.

In Point III, the appellants, striving to find reversible error when none exists, next point to the limited isolated presence of the plaintiffs' children in the courtroom during summation and charge, the only time during the three-week trial no children were there.

There was never a motion for a curative instruction; there was no motion addressed to the matter at any time by defense counsel, not even in the post-trial motion for a new trial (26a-34a). The only other mention of the matter in the record is during defendants' final argument, where the complaining defendants-appellants themselves made much ado about the children (2351-2). The trial court was never presented with any matter for ruling; and there could not possibly be any reversible error in this regard. Compare *Tropea v. Shell Oil Co.*, 2 Cir. 1962, 307 F. 2d 757 (several references to dependent children in argument; no objection; no reversible error shown; matter not sufficiently prejudicial).

IV.

No abuse of discretion for failure of trial court to declare a mistrial in the interest of justice. Point IV without merit.

Federal Rule of Civil Procedure 61 states:

> "No error in either the admission or the exclusion of or no error or defect in any ruling or order are in any thing done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substance or rights of the parties."

The appellants urge in Point IV that somehow Rule 61 *mandates* a new trial. They simply allude to two cases —the only two they cite in their brief. The first, *Commercial Credit Corp. v. United States*, 175 F. 2d 905, 908, holds that a judgment *will not* be reversed if there is an exclusion of evidence not prejudicial to substantial rights

of a party. If that rule applies here at all, it requires affirmance—not reversal; because any error in exclusion, if any there were, which there weren't, was totally harmless here.

And, of course, *Thurber Corp. v. Fairchild's Motor Corp.*, 269 F. 2d 841, 844, holds that erroneous exclusion of evidence which is essential to a case, may amount to prejudicial error. We do not disagree.

We further agree that the record here must be viewed in its entirety. So viewed, the case overwhelmingly demonstrates liability. We disagree that the plaintiffs' case was presented by trial counsel in a matter not to be condoned. We would state that the defense was, and on this appeal is, presented in a manner not to be condoned; that the documents, records, independent eyewitness testimony, and the medical histories demonstrate clear liability, as found by the jury—not fabrication. The defense would have it, that the "whole platoon is out of step"; that the independent eye witness did not tell the truth; that plaintiff did not tell the truth; that the medical histories entered and made on the day of the accident—long prior to presence of any lawyers—were planted by lawyers; that the plainitffs' version was a fabrication, even though a key defense witness maintained a notebook, in which he made an entry in his own handwriting, showing that the plaintiffs from the outset claimed that the plank fell from one of defendants' trucks.

The "branch" theory is absurd in the extreme; so also was the contention—made at the outset—that the defendants' trucks were not on the Glen Wild Road that day at all. A reputable, independent witness and public official stated unequivocally that the demolition work was continuing apace during the morning. The business records show massive movements of debris during the day of the accident; and the trips, on a simple mathematical basis, had to be made throughout the day including the morning. The only way that the debris could be carried

to the dump was of course on Glen Wild Road. The jury finally resolved the matter.

The trial court, in the always peculiarly sensitive position to assess what transpired, found that there was no basis here for a new trial or a mistrial. There was nothing vital precluded in the defendant's version anyway; they never showed in any event what the proof would have been, which they claimed was so vital to their case. And even if the proof were as they represent now, or as they represented after the verdict, still, it would be substantially cumulative to what they presented at trial in its major aspects anyhow. The travesty here would be to reverse this case—so thoroughly, completely and vigorously tried. On consideration of the entire record, we respectfully believe that the court will affirm the trial court's carefully considered denials of post-trial relief.

V.

Conclusion.

The judgment below should be affirmed in every respect.

Dated: Liberty, New York,
April 14, 1975.

Respectfully submitted,

GERALD ORSECK,
Counsel to EDELMAN, BERGER, PETERS & KOSHEL,
Attorneys for Plaintiffs-Appellees.

JEROME EDELMAN,
GERALD ORSECK,
ROBERT ORSECK,
Of Counsel and on the Brief.

tae of New York
nty of Sullivan SS:

CHRISTINE BULD, being duly sworn, deposes that
April 13, 1975, she mailed three copies of this brief,
the postoffice, Liberty, N.Y., to

SERGI & FETELL ESQS
44 Court St.
Brooklin N.Y. 11201

Dominick J. Comella Esq.
160 Broadway
New York, N.Y. 10038

orn to before me
13 day of Apr. 1975

Christine Buld

GERALD OTTECK
otary Public, State of New York
No. 762
Sullivan County
Term Expires March 30, 1976